IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
The Honorable Michael R. Smolenski, Presiding

CHARLES SINGTON
Plaintiff-Appellee,

v

Docket no. 119291

CHRYSLER CORPORATION
Defendant-Appellant.
_____/

BRIEF ON APPEAL - AMICUS CURIAE MICHIGAN SELF-INSURERS' ASSOCIATION

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WHETHER THE DESCRIPTION OF *DISABILITY* BY THE COURT IN *POWELL v CASCO NELMOR CORP*, 406 MICH 332; 279 NW2D 769 (1979) AND *HASKE v TRANSPORT LEASING, INC, INDIANA*, 455 MICH 628; 566 NW2D 896 (1997) CAN BE RECONCILED WITH THE DESCRIPTION BY STATUTES IN THE WORKERS' DISABILITY COMPENSATION ACT OF 1969, MCL 418.301(4); MSA 17.237(301)(4) AND MCL 418.401(1); MSA 17.237(401)(1).

Plaintiff-appellee Sington answers "Yes."

Defendant-appellant DaimlerChrysler answers "No."

Amicus curiae Michigan Self-Insurers' answer "No."

Court of Appeals did not answer.

Workers' Compensation Appellate Commission did not answer.

Board of Magistrates did not answer.

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[1] The Court propounded this question when granting the application for leave to appeal.

STATEMENT OF FACTS

A restriction which was issued by physicians as a precaution after surgery for a personal injury that plaintiff-appellee Charles Sington (Employee) had on June 24, 1994, did not interfere with continuing the same job for defendant-appellant Chrysler Corporation (Employer). (17a-18a) Work was interrupted and then ended by personal problems. (18a)

The Board of Magistrates (Board) denied weekly workers' disability compensation with the decision that the Employee was not *disabled* by the personal injury to the left shoulder at work on June 24, 1994, after resuming work for the Employer. *Sington v Chrysler Corp*, unpublished order and opinion of the Board of Magistrates, decided on February 17, 1999 (Docket no. 021799076). (7a-16a)

The Workers' Compensation Appellate Commission (Commission) affirmed. *Sington v Chrysler Corp*, 2000 Mich ACO 322. (17a-21a)

The Court of Appeals granted leave to appeal, *Sington v Chrysler Corp*, unpublished order of the Court of Appeals, decided on July 28, 2000 (Docket no. 225847) (24a), and reversed the decision that the Employee was not disabled and remanded the case for the Commission to decide the length of service after resuming work and apply either MCL 418.301(5)(d); MSA 17.237(301)(5)(d) or MCL 418.301(5)(e); MSA 17.237(301)(5)(e). *Sington v Chrysler Corp, a/k/a DaimlerChrysler Corp*, 245 Mich App 535; 630 NW2d 337 (2001). (25a-35a)

The Court granted leave to appeal and directed that the Employee and Employer brief the questions "whether *Haske v Transport Leasing, Inc*, 455 Mich 628 (1997), and *Powell v Casco Nelmor Corp*, 406 Mich 332 (1979) are reconcilable" and "whether *Powell* or *Haske* can be reconciled with disability determinations under MCL 418.301(4), and weekly wage loss benefit determinations in light of subsequent reasonable employment

under MCL 418.301(5) and MCL 418.301(9)." *Sington v Chrysler Corp, a/k/a DaimlerChrysler Corp*, 465 Mich 940; - NW2d - (2002). (36a)

Amicus curiae Michigan Self-Insurers' Association (MSIA) accepted the invitation to participate as an amicus curiae which the Court extended in *Sington, supra*. (36a)

SUMMARY OF ARGUMENT

All of the problems with the description of *disability* by the Court in cases such as *Powell v Casco Nelmor Corp*, 406 Mich 332; 279 NW2d 769 (1979) and *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628; 566 NW2d 896 (1997) can be recognized and resolved by understanding the text of two identical statutes in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101; MSA 17.237(101), et seq., which describe *disability*, MCL 418.301(4); MSA 17.237(301)(4) and MCL 418.401(1); MSA 17.237(401)(1), and the context of all of the other statutes which describe *disability* now and before.

ARGUMENT

I

THE DESCRIPTIONS OF *DISABILITY* BY THE COURT IN *POWELL v CASCO NELMOR CORP*, 406 MICH 332; 279 NW2D 769 (1979) AND *HASKE v TRANSPORT LEASING, INC, INDIANA*, 455 MICH 628; 566 NW2D 896 (1997) CANNOT BE RECONCILED WITH THE DESCRIPTION BY *STATUTES IN THE WORKERS' DISABILITY COMPENSATION* ACT OF 1969, MCL 418.301(4); MSA 17.237(301)(4) AND MCL 418.401(1); MSA 17.237(401)(1).

Currently, there are five different kinds of disability which are described by six separate statutes in the WDCA. MCL 418.301(4); MSA 17.237(301)(4). MCL 418.401(1); MSA 17.237(401)(1). MCL 418.361(2)(a) - (l); MSA 17.237(361)(2)(a) - (l). MCL 418.361(3)(a) - (g); MSA 17.237(361)(3)(a) - (g). MCL 418.373(1); MSA 17.237(373)(1). MCL 418.901(a); MSA 17.237(901)(a).

Section 301(4) and section 401(1) were enacted together on May 14, 1987, by 1987 PA 28 and describe one kind of disability as each state that, "[a]s used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss." The kind of disability which is described by section 301(4)[2] is commonly known as general disability having application to most claims for weekly compensation.

Section 361(2)(a) - (l) first applied on January 1, 1982, after having been enacted by 1980 PA 357 and describes a second kind of disability by stating that,

> "[i]n cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:
>
> (a) Thumb, 65 weeks.
>
> (b) First finger, 38 weeks.
>
> (c) Second finger, 33 weeks.
>
> (d) Third finger, 22 weeks.
>
> (e) Fourth finger, 16 weeks.
>
> The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.
>
> The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.
>
> (f) Great toe, 33 weeks.
>
> (g) A toe other than the great toe, 11 weeks.

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[2] The citation of section 301(4) here and throughout the remainder of this brief includes section 401(1) because the two statutes are identical.

The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe.

(h) Hand, 215 weeks.

(i) Arm, 269 weeks.

An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

(j) Foot, 162 weeks.

(k) Leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(l) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye."

This kind of disability is commonly known as scheduled disability from schedule of the length of disability for each physical loss.

Section 361(3)(a) - (g) was enacted on August 1, 1956, by 1956 PA 195 and describes yet another kind of disability by stating that,

"[t]otal and permanent disability, compensation for which is provided in section 351 means:

(a) Total and permanent loss of sight of both eyes.

(b) Loss of both legs or both feet at or above the ankle.

(c) Loss of both arms or both hands at or above the wrist.

(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).

(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.

(f) Incurable insanity or imbecility.

(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury."

This kind of disability is commonly known as total and permanent disability in reference to the statute.

Section 373(1) first applied on January 1, 1982, after having been enacted by 1980 PA 357 and describes the fourth kind of disability by stating that,

> "[a]n employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 U.S.C. 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4."

This particular kind of disability is commonly known as retiree disability because of the status of employment of the employee to whom the statute applies.

Finally, section 901(a) first applied on July 1, 1972, after having been enacted by 1971 PA 183 and describes the fifth kind of disability by stating that, "'[v]ocationally disabled' means a person who has a medically certifiable impairment of the back or heart, or who is subject to epilepsy, or who has diabetes, and whose impairment is a substantial obstacle to employment, considering such factors as the person's age, education, training, experience, and employment rejection." This kind if disability is commonly known as vocational disability or certified disability because it must be certified. MCL 418.905; MSA 17.237(905). Section 905 states that,

> "[a]n unemployed person who wishes to be certified as vocationally disabled for purposes of this chapter shall apply to

> the certifying agency on forms furnished by the agency. The certifying agency shall conduct an investigation and shall issue a certificate to a person who meets the requirements for vocationally disabled certification. The certificate is valid for 2 calendar years after the date of issuance. After expiration of a certificate an unemployed person may apply for a new certificate. A certificate is not valid with an employer by whom the person has been employed within 52 weeks before issuance of the certificate."

These five kinds of disability which are described by the six separate statutes must be considered together because all were in effect after May 14, 1987, and concern the same subject matter. *Reed v Secretary of State*, 327 Mich 108; 41 NW2d 491 (1950). *Metropolitan Council no. 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299; 294 NW2d 578 (1980). *People v Rogers*, 438 Mich 602; 475 NW2d 717 (1991). The Court said in the case of *Metropolitan Council no. 23, AFSCME, supra*, 317-318, that,

> " . . . each part or section must be considered in connection with every other part or section and the meaning ascribed to any one section arrived at after due consideration of the act as a whole so as to produce, if possible, a harmonious and consistent enactment as a whole. *Grand Rapids v Crocker*, 219 Mich 178, 182-184; 189 NW 221 (1922). Sometimes, it is possible to construe an act by dividing it by a process of etymological dissection, apply to each word, clause or provision thus separated from its context some particular meaning given by lexicographers, and then rigidly reconstruct the instrument upon the basis of those intrinsic meanings. More often, however, an act must be construed as a whole, and the particular effect to be attached to any word, clause or provision determined from the context of the whole act, the nature of the treated subject matter, and the purpose or intention of the body which promulgated the act."

The statutes in the WDCA which describe *personal injury* by stating that, "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act," MCL 418.301(1); MSA 17.237(301)(1), first sentence, and "'[p]ersonal injury' shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment," MCL 418.401(2)(b); MSA 17.237(401)(2)(b), first

sentence, do not apply having a different subject. The term *personal injury* is discrete from *disability*. Vocational disability is a condition which must be certified before an employee even starts work for an employer. General disability and retiree disability are conditions which can be established only after an employee has a personal injury because of work for an employer.

The statutes in the WDCA which concern *mental disability* by stating that, "[m]ental disabilities . . . shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof," MCL 418.301(2); MSA 17.237(301)(2) and section 401(2)(b), third and fourth sentences, do not describe a sixth type of disability. Instead, section 301(2) and section 401(2)(b), third and fourth sentences, establish a special standard of causation which applies to bridge a *mental disability* to employment. *Hurd v Ford Motor Co*, 423 Mich 531, 534; 377 NW2d 300 (1985). *Gardner v Van Buren Pub Schools*, 445 Mich 23, 46-47; 517 NW2d 1 (1994), reh den 445 Mich 1205; 519 NW2d 898 (1994).

The statutes in the WDCA which concern total disability, MCL 418.351(1); MSA 17.237(351)(1), first sentence, and partial disability, MCL 418.361(1); MSA 17.237(361)(1), first sentence, do not describe a sixth and seventh kind of disability or the degree of any kind of disability. Instead, section 351(1), first sentence, and section 361(1), first sentence, only prescribe the amount of the weekly compensation once an injured employee has established one of the five kinds of disability by stating that,

> "[w]hile the incapacity for work resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355." Section 351(1), first sentence,

and

> "[w]hile the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355." Section 361(1), first sentence.

Other statutes which may describe *disability* such as the Automobile No Fault Act, MCL 500.3101; MSA 24.13101, et seq.; the Persons with Disabilities Civil Rights Act, MCL 37.1101; MSA 3.550(101), et seq., and the Americans with Disabilities Act of 1990, 42 USC 12101, et seq., and the compensation statutes enacted by other states cannot apply because all concern a different subject of people other than employees who are injured by Michigan employment and provide only a single description.

The five kinds of disability that are described by the WDCA may be organized in three ways. Time is one way of organizing the statutes because vocational disability must be established before an employee has a personal injury at work as MCL 418.921; MSA 17.237(921), first sentence, states that, "[a] person certified as vocationally disabled who [later] receives a personal injury arising out of and in the course of employment . . . shall be paid compensation . . ." Indeed, vocational disability must be established before hiring as section 905, last sentence, states that, "[a] certificate is not valid with an employer by whom the person has been employed within 52 weeks before issuance . . ." The other four kinds of disability, general disability, retiree disability, scheduled disability, and total and permanent disability are determined only *after* an injury occurs. For example, section 301(4), first sentence, states that, "'disability' means a limitation of an employee's wage earning capacity . . . resulting from a personal injury . . ."

The characteristic of wage earning capacity is another way to organize the statutes. Wage earning capacity is a characteristic of vocational disability, general disability and retiree disability but is foreign to scheduled disability and total and permanent disability.

Wage earning capacity is a characteristic of vocational disability because section 901(a) describes that as an "impairment [which] is a substantial obstacle to employment." Likewise, wage earning capacity is a characteristic of general disability because section 301(4), first sentence, states that, "'disability' means a limitation of an employee's *wage earning capacity* in work suitable to his or her qualifications and training" (emphasis supplied) Similarly, wage earning capacity is a characteristic of retiree disability because section 373(1), first sentence, states, "shall be presumed not to have a loss of earnings *or earning capacity* as the result of a compensable injury." (emphasis supplied)

Wage earning capacity is alien to both scheduled disability and total and permanent disability as the characteristic of each is the physical loss or losses after an injury regardless of any practical consequence. Section 361(2) states that, "in the following schedule, the disability *shall be considered to continue* for the period specified." (emphasis supplied) It is the use of the imperative *shall* in the phrase *shall be considered to continue* in section 361(2) which divorces *wage earning capacity* as a characteristic of disability when a physical loss occurs. Despite terms which suggest that total and permanent disability refers to the degree of disability as *total* and the duration *permanent*, the actual nomenclature of section 361(3)(a) - (g) establishes that a total and permanent disability is the physical loss or complete paralysis of major limbs of the body such as both hands, both arms, both feet, both legs, or a combination of these limbs such as one hand and the other arm. Section 361(3)(a) - (e). The insanity referred to by section 361(3)(f) is the loss of the mind comparable to the loss of the limbs. *Redfern v Sparks - Withington Co*, 403 Mich 63; 268 NW2d 28 (1978). *Loss of industrial use* which is included as a total and permanent disability is the exception that establishes the rule by allowing for the consideration of *wage earning capacity* but requires the utter inability to use both hands at any work. *Redfern, supra*, 80. *Cain v Waste Mgt, Inc*, - Mich - ; - NW2d - (Docket nos. 116389, 116945, *rel'd* January 23, 2002), slip op., 4-5. The Court aptly recognized in *Cain, supra*, slip op., 4-5,

that, "'loss of industrial use' is a special category of total and permanent disability benefits found in [section 361(3)(g)]. This category allows recovery for total and permanent disability where there is no anatomical loss, but where there is a loss of industrial use."

Wage loss is not a way of organizing the statutes because there is no kind of disability which is characterized by a change in earned income after a personal injury. The plain text of the statutes which describe vocational disability, general disability, and retiree disability refer to the ability to work whether that capacity is or is not exercised. An injured employee may have a vocational disability, general disability or a retiree disability and experience no wage loss by actually exercising the ability to work. Section 901(a) anticipates that a vocationally disabled employee will actually exercise the ability to work upon certification.

Two statutes in the WDCA exclude wage loss as a way of organizing general disability with the other kinds of disability. Section 301(4), second sentence, states that the "establishment of disability does not create a presumption of wage loss" plainly means that the concept of wage loss is not implied by disability and must be actually demonstrated and concomitantly, infers that disability is not implied by wage loss.

MCL 418.301(5)(b) and (c); MSA 17.237(301)(5)(b) and (c) also excludes wage loss as a way of organizing and understanding general disability by including wage loss as a way of calculating weekly compensation for a current general disability by stating that,

> "[i]f disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> * * *
>
> (b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more

than the maximum weekly rate of compensation, as determined under section 355.

(c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment

Wage loss is not a characteristic of scheduled disability or total and permanent disability. Physical loss is the characteristic of each of these two kinds of disability.

The amplitude of the impairment is the third way of organizing the five kinds of disability. The amplitude of general disability is higher than that of retiree disability because section 301(4), first sentence, refers to a *limitation* by stating that, "'disability' means a *limitation* of an employee's wage earning capacity in work suitable to his or her qualifications and training . . ." (emphasis supplied) while retiree disability has a lower amplitude because section 373(1) refers to the describing *loss* of wage earning capacity by stating that, "[t]he presumption may be rebutted only by a preponderance of the evidence that the employee is *unable* . . . to perform work suitable to the employee's qualifications . . ." (emphasis supplied) Similarly, the amplitude of scheduled disability is higher than the amplitude of total and permanent disability because section 361(2)(a) - (l) describe an individual physical loss such as a thumb, a foot, an eye, section 361(2)(a), (j) and (l) while section 361(3)(a) - (g) refers to a lower amplitude by describing two physical losses of major limbs such as both eyes, both hands or complete paralysis of two limbs. Section 361(3)(a), (c) and (e).

The relationship of the six statutes which describe the five kinds of disability may be charted by the time of disability before and after injury and with the characteristic of wage earning capacity as the domain and the amplitude as the range,

BEFORE PERSONAL INJURY OR OCCUPATIONAL DISEASE

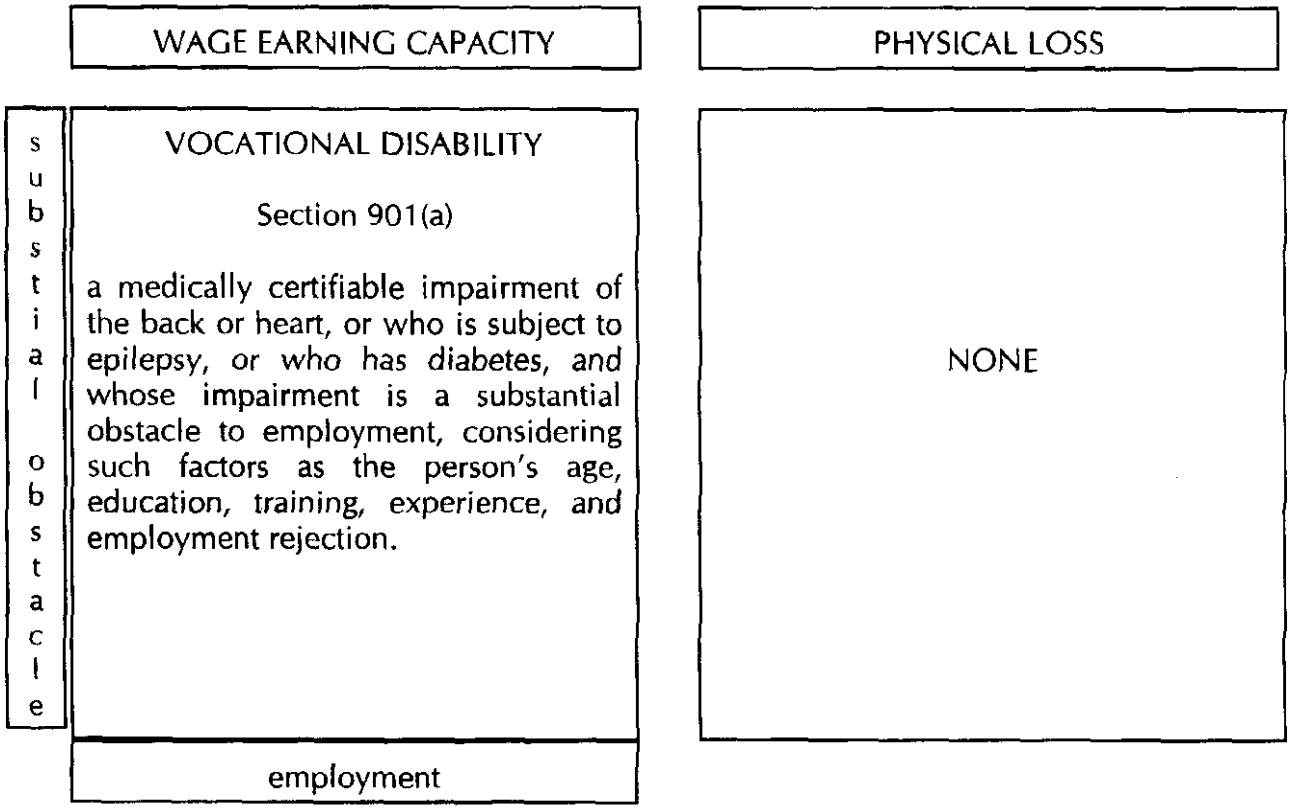

figure no. 1a

AFTER PERSONAL INJURY OR OCCUPATIONAL DISEASE

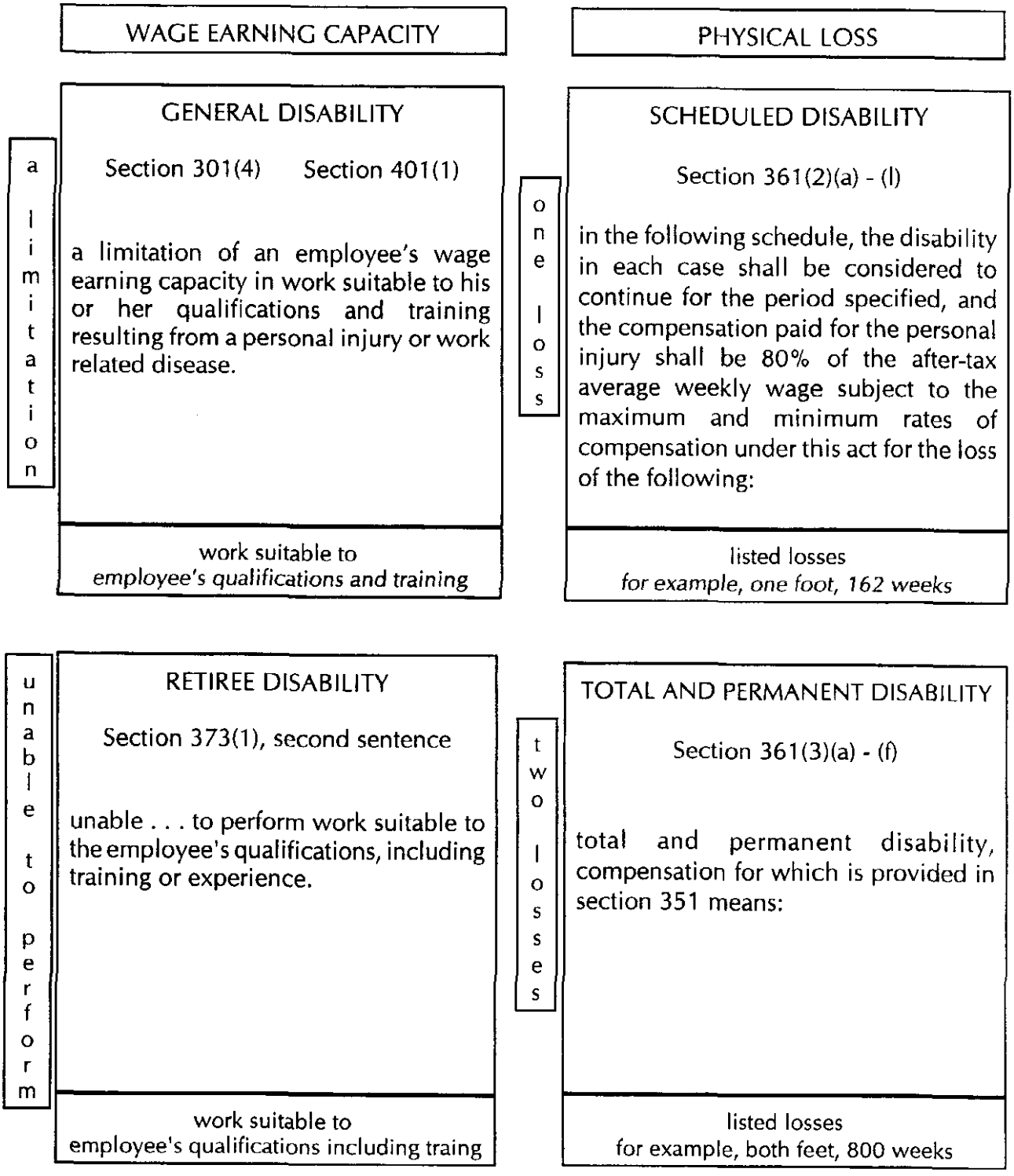

figure no. 1b

This organization reveals that each kind of disability which the WDCA describes is discrete and how to recognize and retain the differences.

General disability can be established only after a personal injury because of work. This is manifest from the text of section 301(4), first sentence, which states that, "'disability' means a limitation of an employee's wage earning capacity . . . *resulting from* a personal injury or work related disease." (emphasis supplied) It is this text *resulting from* which distinguishes general disability from personal injury. Also, it is this text *resulting from* which distinguishes general disability from vocational disability which must be certified before an injury occurs.

General disability can be established only on an individual basis because of the singular possessive *employee's* in "'disability' means a limitation of *an employee's* wage earning capacity . . ." (emphasis supplied) This means that a condition after an injury may be a general disability for one individual injured employee and not a general disability for another. This text distinguishes general disability from scheduled disability and total and permanent disability which are not individualized. A scheduled disability that one individual employee experiences with the loss of an arm is exactly the same disability when another employee has the same loss of an arm.

General disability can be established from one specific field of reference because the noun *work* is modified by the subordinate clause *suitable to his or her qualifications and training* in "'disability' means a limitation of an employee's wage earning capacity *in work suitable to his or her qualifications and training* . . ." (emphasis supplied) This text means that the consequences of an injury in the non-vocational life of the employee whether personal appearance such as a scar or other disfigurement, social interaction such as a divorce or alienation from family and friends, or recreational activity such as sports or other pastimes are not important. This distinguishes general disability from one type of total and permanent disability which may include the consequence of an injury in the

non-vocational life of the employee when deciding incurable insanity described by section 361(3)(f). *Redfern, supra*. Also, it is the text *work suitable to his or her qualifications and training* which means that the field of reference for deciding general disability is not confined to only the specific job which the employee performed when injured or indeed, any specific job. Were the field of reference restricted to one job, then the description of general disability would have to be redacted to "'disability' means a limitation of an employee's wage earning capacity in the work *pursued at the time of injury*."

This field of reference does not necessarily expand to include every job which an injured employee might have actually performed. The qualifications and training which an employee had acquired and actually used to work may be obsolete with time. Many people experience this phenomena when trying to re-enter the work force after an absence of ten or twenty years to raise children only to discover that the qualification and training with equipment that was previously used at work in retail sales, an office, and even teaching is obsolete with the introduction of computers. Others experience this phenomena when leaving a job held for many years and discover that there are no readily transferrable abilities.

Similarly, the field of reference is not broad enough to include considering work which might have been acquired in the future because of the present tense of the adjectival phrase *qualifications and training* in section 301(4), first sentence, "'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and train*ing*." (emphasis supplied) Were the field of reference for general disability broad enough to include work which the employee might have performed in the future, section 301(4), first sentence, would have use the future tense or text such as "a limitation of an employee's capacity to *acquire* qualifications and training." Indeed, this distinguishes general disability from vocational disability which does consider the capacity of a person to acquire a job.

The WDCA recognizes this by describing *reasonable employment* as work beyond the domain of *work suitable to his or her qualifications and training.* MCL 418.301(9); MSA 17.237(301)(9). Section 301(9) describes *reasonable employment* as,

> ". . . work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training."

Section 301(9), second sentence, explicitly excludes *reasonable employment* from the domain for general disability by stating that, "[t]he employee's capacity to perform *shall not* be limited to jobs in *work suitable to his or her qualifications and training*" (emphasis supplied) which is why *reasonable employment* does not contradict general disability or re-establish a wage earning capacity.

It is beyond cavil that the field of reference for general disability is the same field of reference for retiree disability because section 301(4), first sentence, states that, "'disability' means a limitation of an employee's wage earning capacity in *work suitable to his or her qualifications and training*" (emphasis supplied) and section 373(1), second sentence, states that disability occurs when "*the employee is unable . . . to perform work suitable to the employee's qualifications, including training or experience.* (emphasis supplied) That the field of reference for general disability and retiree disability is the same does not mean that the two are synonyms. Indeed, general disability has a particular amplitude as well as a particular field of reference because of the adjective *a limitation* in the statute "'disability' means *a limitation* of an employee's wage earning capacity . . ." (emphasis supplied) Use of the indefinite article *a* instead of the definite article *the* is not important to understanding the amplitude of general disability because the amplitude is the adjective *limitation*, and is not a noun. Use of the indefinite article *a* or the definite article *the* is generally important when preceding a noun. *Robinson v City of Detroit*, 462 Mich 439, 461; 613 NW2d 307 (2000). There, the Court held that,

> "[w]e agree with the following analysis found in the dissent of *Hagerman v Gencorp Automotive*, 457 Mich 720, 753-754; 579 NW2d 347 (1998):
>
> Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between 'the' and 'a.' 'The' is defined as 'definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . ." *Random House Webster's College Dictionary*, p 1382. Further, we must follow these distinctions between 'a' and 'the' as the Legislature has directed that '[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . . MCL 8.3a; MSA 2.212(1). Moreover, there is no indication that the words 'the' and 'a' in common usage meant something different at the time this statute was enacted. . . .
>
> Further, recognizing that 'the' is a definite article, and 'cause' is a singular *noun*, it is clear that the phrase 'the proximate cause' contemplates *one* cause." (first emphasis, supplied; second emphasis by the Court)

Certainly, the amplitude of general disability does not change at all with use of the definite article *the* instead of the indefinite article *a* because *the limitation* means just the same as *a limitation*.

This amplitude of general disability established by *a limitation* means that the individual employee must at least be limited in all the jobs in the field of reference which is *work suitable to his or her qualifications and training*. There is no general disability when an injured employee remains fully capable of all of the tasks of one job within the field of reference. This may be seen by the following chart which expresses the field of reference of *work suitable to his or her qualifications and training* as the domain and the amplitude of *a limitation* as the range,

GENERAL DISABILITY

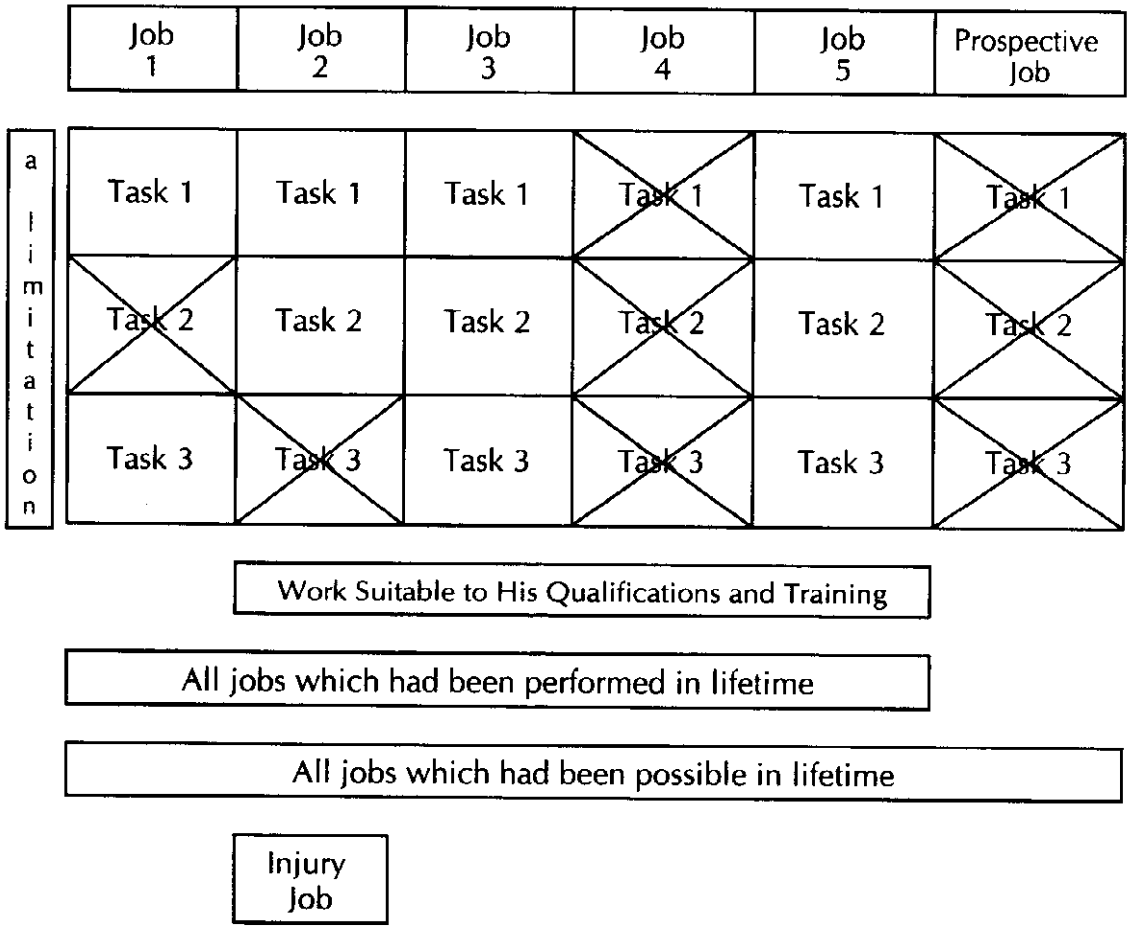

figure no. 2

In this chart, the tasks which comprise each of the sundry jobs are abbreviated and may include the hours of work such as forty hours weekly, "Task 1," the requirement of traveling to and around a work station such as opening doors, walking down a corridor, up some stairs, "Task 2," and the specific physical and mental demands such as standing and operating a press, sitting at a desk and operating a computer or walking to deliver goods, "Task 3."

The injured employee in figure no. 2 is not generally disabled because Jobs 3 and 5 are within the domain as *work suitable to his or her qualifications and training* and

there is no limitation in the range because the injury does not limit the ability of the employee to do any of the individual tasks of each. The amount of remuneration for Job 3 and Job 5 may be considered but alone is not dispositive. The injured employee is as capable of working at Job 3 which may pay more than the injury job, Job 2, as at Job 5 which may pay less than the injury job, Job 2, and Job 3.

The limitation in Job 1 because the inability to pursue Task 1 and the complete inability to acquire the qualifications and training for a new career represented by the Prospective Job because the injury prevents completion of an education to acquire a certification as an accountant or a master plumber are not at all important because both are beyond the field of reference of *work suitable to qualifications and training*.

The injured employee in figure no. 2 could be described as generally disabled by disregarding the domain of *work suitable to his or her qualifications and training* and using another domain. The injured employee could be described as generally disabled by changing the domain to only Job 2 which is the job that was pursued when the injury occurred or to the domain of the Prospective Job which is the job that cannot be acquired because then those limitations of Task 3 at Job 2 and Task 1-3 at the Prospective Job apply and the full ability to pursue Job 3 and 5 becomes irrelevant. Disregarding the domain is not proper because it blurs or erases the language which was used by the Legislature to create the particular kind of disability. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; - NW2d - (2002), "our function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts."

The injured employee in figure no. 2 could also be described as generally disabled by disregarding the domain of *work suitable to his or her qualifications and training* and using a quantitative domain such as the total number of jobs which are within grasp before and after the injury. The injured employee can be described as generally disabled

with this change of the domain because five jobs could be performed before the injury which are Jobs 1-5 but only two remain in reach afterwards which are Job 3 and 5. Aside from disregarding the actual text of section 301(4), the allure of a tally of jobs at one extreme when the injured employee remains capable of only one of one hundred earlier jobs fades at the other extreme when the injured employee remains fully capable of ninety-nine of one hundred earlier jobs. At that extreme, Superman is generally disabled because one job at Kryptonite Corporation cannot be done. This is by no means hyperbole. In *Wilkins v General Motors Corp*, 204 Mich App 693; 517 NW2d 40 (1994), the Court of Appeals unwittingly used such a quantitative domain to conclude that an injured employee *was* generally disabled when having an aversion to working with one particular supervisor even though fully capable of the work itself on another shift or at another employer.

Counting the pay actually earned before and after an injury which is relevant but not dispositive of general disability is consistent with other statutes in which counting the pay actually earned before and after an injury is relevant and dispositive. Counting the pay difference is dispositive after general disability has been established to calculate the amount of weekly compensation. Section 301(5)(b) and (c). Section 361(1), first sentence. To make the amount of earned income relevant *and dispositive* of general disability would conflate section 301(4) with section 301(5)(b), (c) and section 361(1), first sentence.

An injured employee need not be completely impaired by the personal injury at work which may be seen by varying figure no. 2,

GENERAL DISABILITY

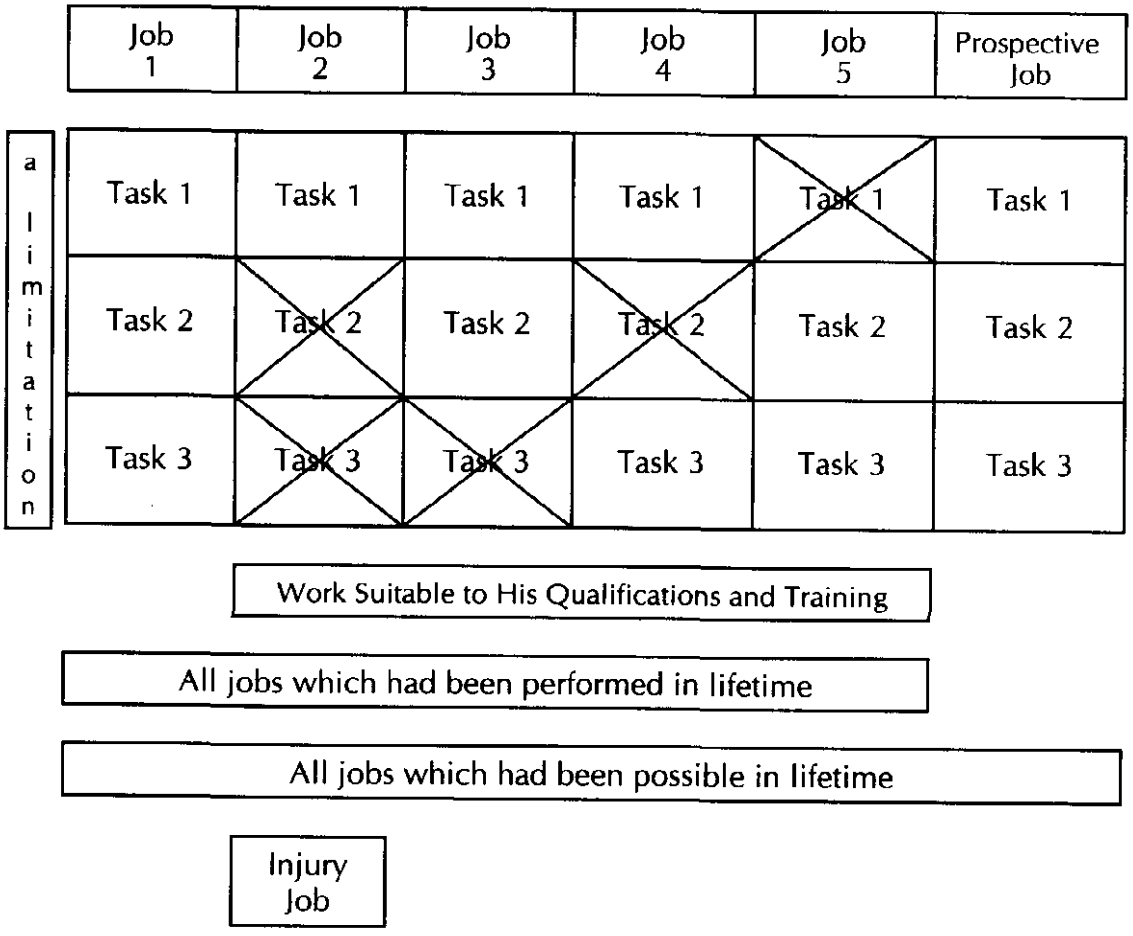

figure no. 3

The injured employee in figure no. 3 is generally disabled by using the same domain of *work suitable to his or her qualifications and training* and the same range of *a limitation* from figure no. 2, because there is at least one limitation in each of the jobs in the domain even while retaining the capacity to do much of each. The fact that the injured employee remains fully capable of resuming Job 1 such as pizza delivery or babysitting which was pursued in youth and fully capable of a Prospective Job in a new field or a new career such as accounting by finishing an education is not at all important because

both of these are beyond the domain of *work suitable to his or her qualifications and training.*

This range for general disability of *a limitation* distinguishes retiree disability which has the range of *unable to perform* which may be seen by charting *retiree* disability with the domain of *work suitable to the employee's qualifications, including training or experience* and the range of *unable to perform,*

RETIREE DISABILITY

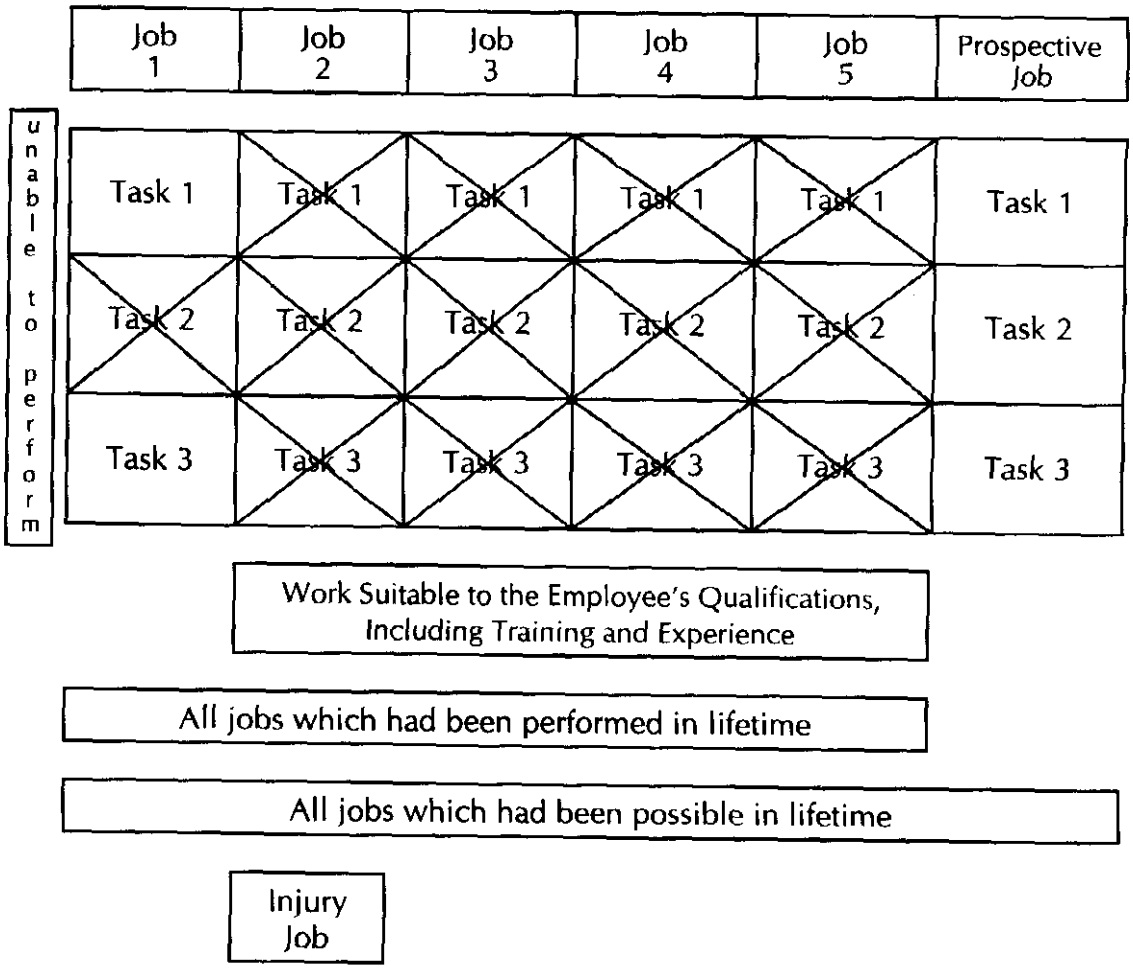

figure no. 4

The injured employee in figure no. 3 who has a general disability because the injury prevents at least one task in Jobs 2, 3, 4, and 5 does not have a retiree disability because many tasks remained possible. Only the injured employee in figure no. 4 has a retiree disability because no task of any job in the proper domain remains possible and so, is *unable to perform* which is a lower range than a limitation.

The injured employee in figure no. 4 also has a general disability because there is no task in any job in the domain of *work suitable to his or her qualifications and training* which remains possible. The WDCA recognizes this difference between the generally disabled employee in figure no. 3 and the generally disabled employee in figure no. 4 whose range of impairment is all tasks of all jobs. While both receive the same weekly compensation because of section 351(1), first sentence, only one qualifies for vocational rehabilitation described by MCL 418.319(1); MSA 17.237(319)(1) because of the range of impairment. Section 319(1), second sentence, allows vocational rehabilitation when the range of impairment is a complete loss of wage earning capacity in the same domain of work suitable to qualifications and training by use of the term *unable to perform* which also found in the description of the range for retiree disability,

> "[w]hen as a result of the injury he or she is *unable to perform* work for which he or she has previous training or experience, the employee shall be entitled to such *vocational* rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to useful employment." (emphasis supplied)

The injured employee in figure no. 3 has a general disability to receive weekly compensation because of the incapacity to do at least one task in each of those jobs in the domain of *work suitable to his or her qualifications and training* which is *a limitation* but cannot receive vocational rehabilitation because of the remaining capacity to perform many of the tasks which is not *unable to perform*. The injured employee in figure no. 4 is also generally disabled to receive weekly compensation because of the incapacity to do at least one task in each of those jobs in the domain of *work suitable to qualifications and training*

but can also receive vocational rehabilitation because there is no task which can be pursued which is *unable to perform*. The injured employee in figure no. 3 can qualify for both weekly compensation and vocational rehabilitation by treating the range of impairment for general disability of a *limitation* as the same range of impairment for vocational rehabilitation of *unable to perform* which the text cannot sustain.

In this case, the Employee does not have a general disability because of the uncontested capacity to pursue all of the tasks required by jobs within the field of reference. Essentially, the Employee is in the situation like figure no. 2 except the Employee can even do the particular job held at the time of the injury. That there are jobs which the Employee might not do such as prospective jobs does not matter for that is beyond the field of reference.

Of course, another employee with exactly the same injury and exactly the same consequences could be generally disabled because the qualifications and training of that other worker could be narrower and no job with the domain be available without some limitation. Again, distinguishing each injured employee is required by the singular possessive *employee's* in the statute.

This was not always the law. Before the enactment of section 301(4) on May 14, 1987, there were six kinds of disability, not five, which were described by different statutes in the WDCA. Between May 14, 1987, and January 1, 1982, there were the vocational disability described by section 901(a), retiree disability described by section 373(1), scheduled disability described by section 361(2)(a) - (l), total and permanent disability described by section 361(3)(a) - (g) and two different kinds of general disability described by two different statutes. One kind of general disability was established for an employee who experienced a personal injury because of work by stating that,

> "[a]s used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in the employee's general field of employment resulting from a personal injury or work related disease. The establishment of disability does not create

> a presumption of wage loss." 1980 PA 357. MCL 418.301(4); MSA 17.237(301)(4). [prior section 301(4)].

The other kind of general disability was established for an employee who contracted an occupational disease by stating that,

> "[a]s used in this chapter, 'disability' means the state of being disabled from earning full wages at the work in which the employee was last subject to the conditions resulting in disability." MCL 418.401(1); MSA 17.237(401)(1). [prior section 401(1)].

The relationship of these statutes which describe six kinds of disability before May 14, 1987, may be appreciated by the chart which dates the time of disability before and after an injury/disease and expresses the domain as the characteristic of wage earning capacity and the range as the amplitude of that as in figure no. 1,

BEFORE PERSONAL INJURY OR OCCUPATIONAL DISEASE

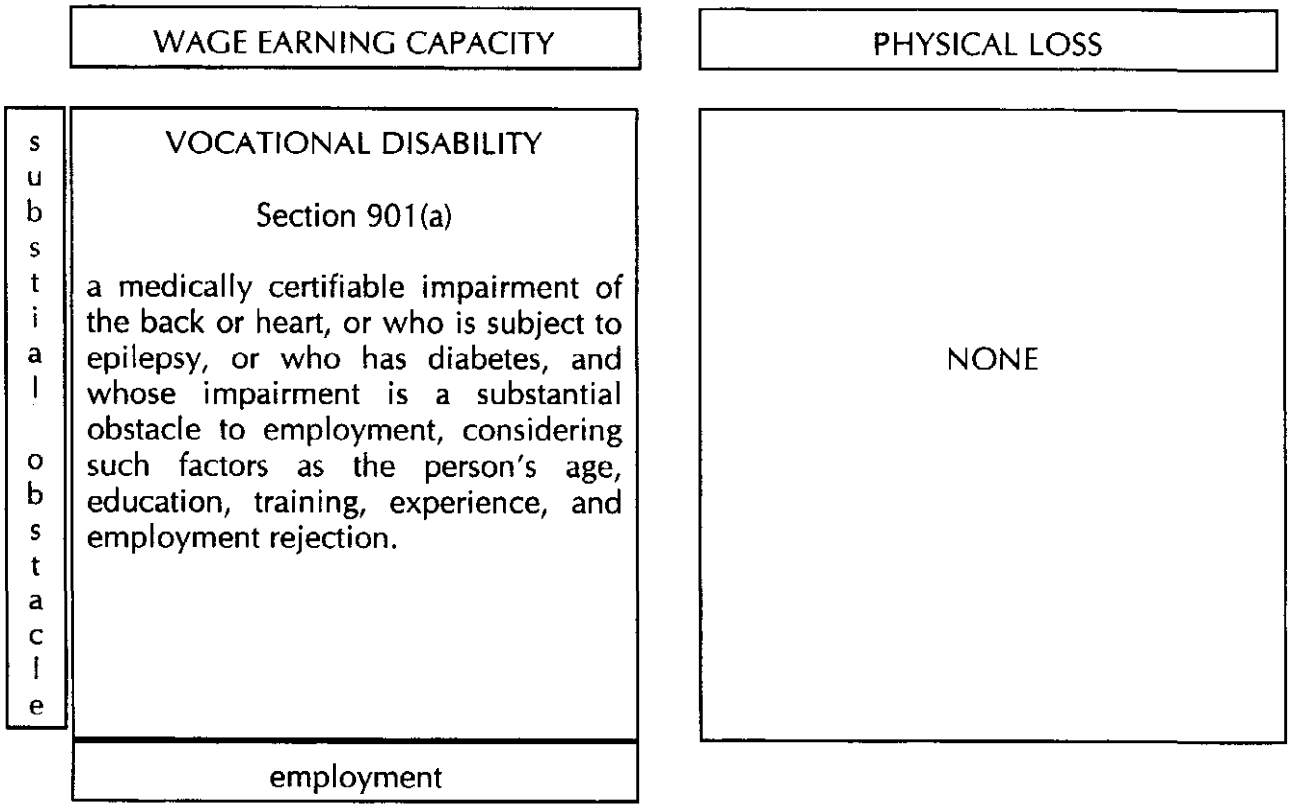

figure no. 5a

AFTER PERSONAL INJURY OR OCCUPATIONAL DISEASE

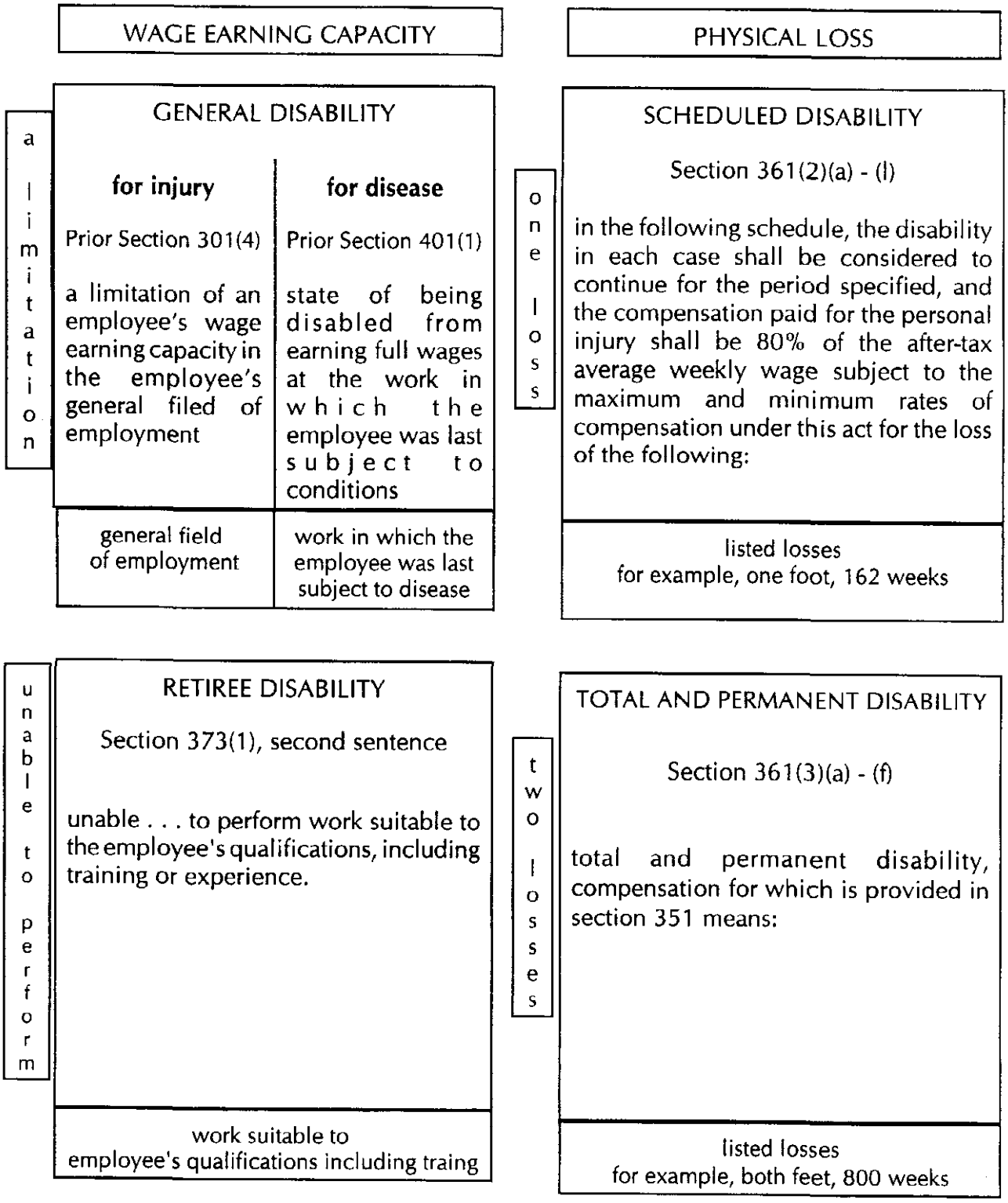

figure no. 5b

This historical context of section 301(4) establishes the breadth and the depth of the change in the description of general disability. Certainly, the description of general disability was unified by abolishing the different description for general disability after a personal injury by prior section 301(4) and for general disability after an occupational disease by prior section 401(1) and having a single description in section 301(4). The characteristic of *wage loss* which was embedded in prior section 401(1), first sentence, by the text of *disabled from earning full wages* was jettisoned by section 401(1), first sentence, and replaced with the characteristic of *wage earning capacity* in section 401(1) and continued in section 301(4). Finally, the field of reference for general disability was changed from the *employee's general field of employment* established by prior section 301(4), first sentence, to *work suitable to his or her qualifications and training* while the amplitude of the impairment of *a limitation* was retained.

Changing the field of reference reduced the number of injured employees who could qualify as generally disabled by enlarging the field of reference to include jobs where all of the tasks could be performed as seen by the chart that expresses the field of reference of *general field of employment* and *work suitable to qualifications and training* as the domain and the amplitude of impairment of *a limitation* in prior section 301(4) and section 301(4) as the range reveals how the number of employees qualifying as generally disabled occurs by enlarging only the domain,

GENERAL DISABILITY

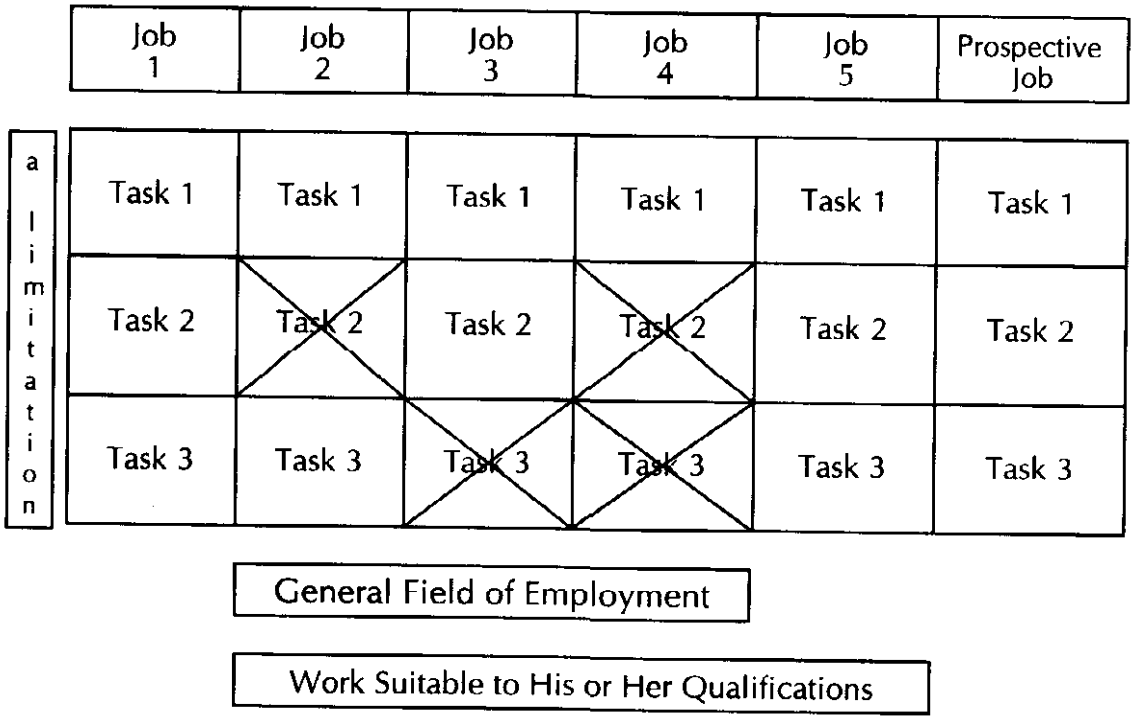

figure no. 6

The injured employee in figure no. 6 qualified as generally disabled when prior section 301(4) applied because there was at least one task which could not be performed in each of the jobs in the domain of jobs in the *general field of employment* as a carpenter which are Task 2 of Job 2, Task 3 of Job 3, and Tasks 2 and 3 of Job 4. This could occur when a shoulder injury prevented hammering (Task 2) at rough carpentry (Job 2) and climbing ladders (Task 3) at finish carpentry (Job 3). However, the injured employee does not qualify as generally disabled when section 301(4) applies by enlarging the domain of jobs to include Job 5 which the personal injury does not limit in any way. This occurs when Job 5 could be either supervising construction or as an instructor of carpentry which the particular individual may be qualified and trained for. To qualify this employee as generally disabled when section 301(4) applies disregards the plain change in the text of section 301(4) which enlarged the domain of jobs from *general field of employment* to *work*

suitable to his or her qualifications and training and the principle that a change in a statute effected by an amendment means a change in law. *Strong v Daniels*, 3 Mich 466 (1855). *People v Johnson*, 270 Mich 622; 259 NW2d 343 (1935). *In re Estate of Loakes*, 320 Mich 674; 32 NW2d 10 (1948). The Court held in *In re Estate of Loakes, supra*, 679, that, "[a] material change in language in the amendment or re-enactment of a statute must be regarded, unless otherwise indicated, as evidencing a purpose to change the force and effect of the existing law. [citation omitted]." Certainly, this principle is eviscerated by attention to only the range of *a limitation* in prior section 301(4) which was retained by section 301(4).

There is another legislative context of section 301(4) which is different from the subject matter of general disability that had been described by prior section 301(4) and prior section 401(1). Section 301(4) was one of three amendments to the WDCA which were enacted by 1987 PA 28. The other two amendments were MCL 418.131(1); MSA 17.237(131), second through fifth sentences, and MCL 418.354(17) - (21); MSA 17.237(354)(17) - (21). Section 131(1), second through fifth sentences, concerned the liability of an employer for an intentional tort which injured an employee by stating that,

> "[t]he only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act as an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law."

Section 354(17) - (21) concerned the coordination of weekly compensation and retirement income such as old-age social security and pension benefits when the employee was generally disabled because of an injury before March 31, 1982, by stating, in pertinent part that,

> "[t]his section applies only to payments resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to section 351,

> 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement to the employer or carrier."

and

> "[n]otwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier."

While having subjects other than *disability*, the legislative context must be considered because all three amendments were substantial changes in the law by repudiating the interpretation of the WDCA by courts in each of the three subjects. Section 131(1), second through fifth sentences, was a flat repudiation of the decision of the Court in *Beauchamp v Dow Chemical Co*, 427 Mich 1; 398 NW2d 882 (1986) which was recognized in *Travis v Dries & Krump Mfg Co*, 453 Mich 149, 164-168; 551 NW2d 132 (1996). Section 354(17) - (21) was a flat repudiation of the decision of the Court in *Franks v White Pine Copper Div*, 422 Mich 636; 375 NW2d 715 (1985), reh den, sub nom *Chambers v General Motors Corp*, 424 Mich 1202; 389 NW2d 685 (1985) which the Court recognized in *Romein v General Motors Corp*, 436 Mich 515, 522-523; 462 NW2d 555 (1990), reh den 437 Mich 1202; 466 NW2d 281 (1990), aff'd 503 US 181; 117 LEd2d 328; 112 S Ct 1105 (1992). Section 301(4) was a flat repudiation of the decision of the Court of Appeals in *Murdock v Michigan Health Organization*, 151 Mich App 578; 391 NW2d 757 (1986). This was obliquely recognized by the Court in *Travis, supra*, 164. There, the Court said that,

> "1987 PA 28 was a comprehensive reform of the worker's compensation system in Michigan. *It changed the definition of disability*, clarified when an injured employee would have to coordinate his benefits, and clarified the exclusive remedy

provision, subsection 131(1), of the WDCA." (emphasis supplied)

The Court in *Travis, supra*, did not appreciate the depth of the change. In the case of *Murdock, supra*, 583, the Court of Appeals held that prior section 301(4), first sentence, only codified the case law description of general disability before enactment of 1980,

> "[i]n *Kidd v General Motors Corp*, 414 Mich 578, 591-592; 327 NW2d 265 (1982), the Supreme Court discussed the standard to be used in determining disability:
>
> > It is well-established that the standard to be used in general disability cases is whether there is an impairment in wage-earning capacity. This is determined by comparing post-injury with pre-injury ability to compete with the able-bodied for jobs *within the type of work in which the injury occurred.* [Emphasis supplied.]
>
> See also *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243, 251; 262 NW2d 629 (1978), where the Supreme Court noted Larson's definition of compensable disability: 'inability, as the result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training.' 2 Larson, Workmen's Compensation Law, § 57.00.
>
> Recently, the Legislature codified the judicial definition of disability: [quoting prior section 301(4)]"

Section 301(4) was enacted immediately after *Murdock, supra*, and can be viewed only as a repudiation of the idea that legislation was designed to enshrine case law rather than to change that case law.

This historical context also provides the way to reconcile general disability which is described by section 301(4), first sentence, and prior section 301(4), first sentence. Specifically, the description of general disability which is described by section 301(4), first sentence, applies when an employee has an injury because of work after May 14, 1987, when enacted and the description of general disability by prior section 301(4), first sentence, applies when an employee has an injury because of work *before* May 14, 1987. This way of reconciling the statutes is consistent with the principle that a claim for compensation is

subject to the statute(s) which were in effect at the time of the personal injury. *White v General Motors Corp*, 431 Mich 387, 393; 429 NW2d 576 (1988). *Dow Chemical Co v Curtis*, 431 Mich 471, 495; 430 NW2d 645 (1988) (CAVANAGH, J., dissenting). *Sokolek v General Motors Corp*, 450 Mich 133; 538 NW2d 369 (1995). In *White, supra*, 393, the Court held that, "the general rule [is] that statutes which effect substantive rights should be applied prospectively . . ."

This is consistent with section 354(17) - (21). Section 354(17) - (21) applied retroactively because of the explicit declaration in section 354(19) and (20). The silence of section 301(4) suggests that the change in the description of general disability applied only to the claims which were based on injury or disease experienced after the enactment by 1987 PA 28 on May 14, 1987.

In conclusion, prior section 301(4) is valid but can only apply to the claims which are based on an injury experienced by an employee from work after May 14, 1987, when the amendment was enacted and prior section 301(4) on an injury experienced by an employee from work between May 14, 1987, and January 1, 1982, when that statute was in effect. The case law of *Murdock, supra*, and *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57; 523 NW2d 444 (1994), reh den 447 Mich 1202; 525 NW2d 453 (1994) remain valid for claims for weekly compensation by an employee having a personal injury *before* May 14, 1987, when prior section 301(4), first sentence, applied but cannot apply to claims by an employee from a disease which is subject to prior section 401(1) and cannot apply to claims by an employee having an injury *after* May 14, 1987, when section 301(4) applies.

The WDCA did not describe *general disability* for injury before 1980. There was no prior section 301(4). *Kidd v General Motors Corp*, 414 Mich 578, 591-592; 327 NW2d 265 (1982),

> "[i]t is well-established that the standard to be used in general disability cases is whether there is an impairment in

> wage-earning capacity. This is determined by comparing post-injury with pre-injury ability to compete with the able-bodied for jobs *within the type of work in which the injury occurred.*" (emphasis supplied)

The only statute in the WDCA that described general disability was prior section 401(1) which described general disability for a disease. The Court filled this void with a body of case law. The Court decided that general disability *was* a loss of wage earning capacity and *was not* the actual loss of wages. *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418, 423; 145 NW2d 40 (1966). *Sims v RD Brooks, Inc*, 389 Mich 91, 93; 204 NW2d 139 (1973). The field of reference was not *work suitable to his or her qualifications and training* and was not the *employee's general field of employment.* Instead, the field of reference was the particular work that was pursued at the time of the personal injury as skilled work or unskilled work which was also sometimes known as common labor. *Leitz v Labadie Ice Co*, 211 Mich 565; 179 NW 291 (1920). *Kaarto v Calumet & Hecla, Inc*, 367 Mich 128; 116 NW2d 225 (1962). Adair v Metropolitan Building *Co*, 38 Mich App 393; 196 NW2d 335 (1972). The Court of Appeals accurately recapitulated the extant field of reference in the case of *Adair, supra*, 403, "it has long been held that there are two classifications of employment – skilled and common labor (unskilled), with skilled labor divided into many separate skills. [citations omitted]. Whether or not compensation is awarded often depends on the classification . . ."

This approach was recapitulated by the Court in *Powell v Casco Nelmor Corp*, 406 Mich 332, 350; 279 NW2d 769 (1979). There, the Court held that,

> ". . . wages legally could not 'establish an earning capacity'. Since there was no legal post-injury wage-earning capacity there could be no such assumption and, therefore, no continuation of the presumption.
>
> Second, in the present context, it is legally and factually incorrect to conclude that '[p]laintiff carries the burden of proving that because of her hand injuries, her present ability is lower than her pre-injury, wage-earning capacity'. The fact of the matter is that plaintiff had already met her burden of proof.

> In Michigan 'disability' is defined as the 'inability to perform the work claimant was doing when injured'. 2 Larson, Workmen's Compensation Law, § 57.53, p 10-129; see, e.g., *Allen v National Twist Drill & Tool Co*, 324 Mich 660, 663; 37 NW2d 664 (1949); *Parling v Motor Wheel Corp*, 324 Mich 420; 37 NW2d 159 (1949)."

The field of reference for general disability of *work suitable to his or her qualifications and training* by the Court in *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243, 251; 262 NW2d 629 (1978) was an aberration which was based on a commentator, Professor Arthur Larson, not any statute or case law authority and never later recognized.

The amplitude for general disability was a *limitation* and may be seen by charting general disability with a domain of skilled or unskilled work and the range as *a limitation*,

GENERAL DISABILITY

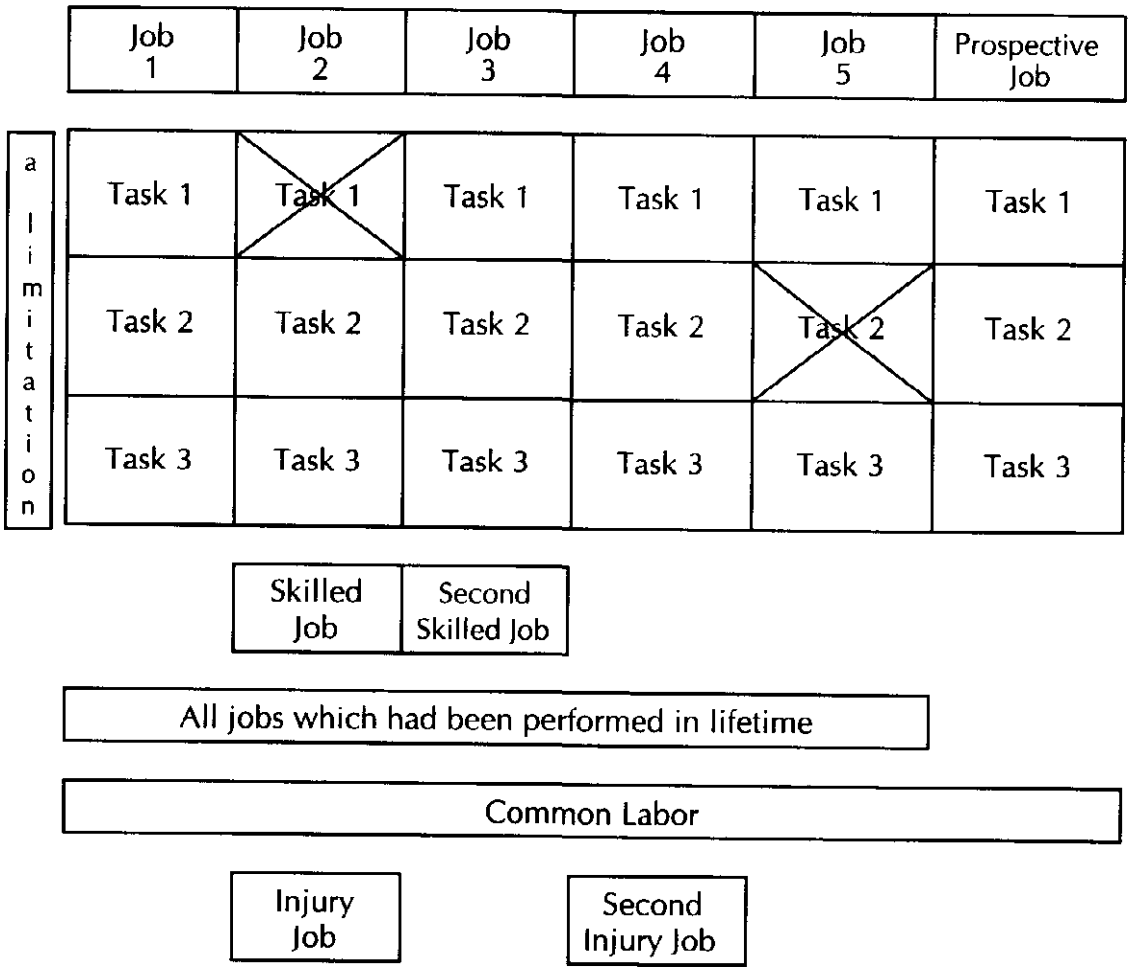

figure no. 7

The employee injured at the skilled work of Job 2 in figure no. 7 is generally disabled because there is one particular aspect of the Injury Job which is precluded which is Task 1 even though fully capable of the other skilled job which is Job 3, and also fully capable of an unskilled job, Job 4. *Kaarto, supra.* The employee with exactly the same injury while at the Second Skilled Job which is Job 3 is not generally disabled because fully able to perform the tasks of that skilled job, although having the same incapacity at the first Skilled Job which is Job 2 and the same incapacity at the Common Labor work of Job 5.

Oddly, the employee having exactly the same injury while at the Common Labor job of Job 4 is also generally disabled even though fully capable of both a skilled job, Job 3, and the unskilled job pursued at the time of the injury, Job 5. The unskilled employee is generally disabled because there is one task in *another* Common Labor job, Task 2 of Job 5, which is out of reach because of the injury. *Adair, supra.*

Aside from the obvious incongruity, this approach was rife with the opportunity for mischief with ad hoc decisions characterizing work as either skilled labor to deny weekly compensation or common labor to allow it when an injured employee could easily perform the particular job held at the time of injury.

To understand whether there was or was no *a limitation* the reason for the end of work was considered. *Mitchell v General Motors Corp*, 89 Mich App 552; 280 NW2d 594 (1979), lv den 407 Mich 881 (1979). There, the Court of Appeals reiterated the rulings of the Court in *Pulley, supra*, and the like, by stating that,

> "[s]ince the reason why an employee leaves his job is only one factor pertinent to the ultimate issue of whether the employee is entitled to compensation for his injury, it is improper to shift the inquiry from whether there was a loss in wage earning capacity to the issue of why the employee left his employment.
>
> * * *
>
> Evidence that plaintiff retired early because of lung problems would tend to establish loss of wage earning capacity. Evidence that he left early to obtain higher pension benefits would tend toe establish the contrary. The weight to be given the evidence is for the board's determination."

However problematic the case law description(s) of general disability by the Court in *Pulley, supra*, through *Powell, supra*, and the application by the Court of Appeals in *Adair, supra*, and *Mitchell, supra*, it is plain that these decisions remain valid only for claims to weekly compensation by employees injured before January 1, 1982, when prior section 301(4) and section 373(1) were first effected. Certainly, section 373(1)

changed the ruling by the Court of Appeals in *Mitchell, supra,* by establishing retiree disability when there was that particular reason for the injured employee to end service.

The only decision by the Court considering section 301(4) is *Haske v Transport Leasing, Inc, Indiana,* 455 Mich 628; 566 NW2d 896 (1997), reh den 456 Mich 1202; 570 NW2d 653 (1997). While *McKissack, supra,* can be reconciled with section 301(4) because the Court had only considered prior section 301(4) which was a statute describing general disability with a different field of reference; *White, supra,* can be reconciled with section 301(4) because the Court had only considered section 373(1) which was a statute describing retiree disability which is entirely different from general disability; and *Powell, supra,* can be reconciled with section 301(4) because the Court had described general disability without considering a statute in the WDCA and with a different field of reference which applied only when the employee was injured before January 1, 1982, when prior section 301(4) was first in effect, *Haske, supra,* cannot be reconciled and must be reversed.

The Court said in *Haske, supra,* that general disability described by section 301(4) was a linear equation connecting wage loss to personal injury. In particular, the Court held in *Haske, supra,* 662, that,

> ". . . we conclude that for an employee to carry his burden of proving an impairment of wage-earning capacity, he must prove (1) a work-related injury, (2) subsequent loss in actual wages, and (3) that the injury caused the subsequent wage loss. Where the employee has carried his burden of proving wage loss, he will, as a practical matter, have proven that he is unable to perform a single job within his qualifications and training, and, therefore, that he is disabled."

This was wrong. This formulation of general disability dissembled the text of section 301(4), first sentence, by expunging the text of *wage earning capacity in work suitable to his or her qualifications and training* and inserting *loss in actual wages.* It is beyond cavil that *wage earning capacity* is not *actual wages.* The Court had always recognized this even when the field of reference for general disability was *skilled common*

labor instead of *work suitable to*. *Sims, supra*, 93, "[u]nder the [WDCA] it is loss of wage earning *capacity* – not actual loss of wages – which is compensable."

This formulation dissembled the text of section 301(4), first sentence, which certainly describes general disability in two dimensions with a field of reference of *work suitable to his or her qualifications and training* and an amplitude of *a limitation* (figure no. 2) for a one dimensional equation of

Personal Injury PLUS Actual Loss of Wages EQUALS Disability

This formulation dissembled the text of section 301(4), first sentence, by expunging the field of reference of *work suitable to his or her qualifications and training* and inserting another field of reference of *a single job* which was wrong because the very purpose of section 301(4), first sentence, was to reduce the number of injured employees qualifying for weekly compensation by *enlarging* the field of reference. The narrowing of the field of reference to *a single job* enlarges the number of injured employees qualifying for weekly compensation by reverting to the field of reference for injuries before January 1, 1982. (figure no. 6). *Adair, supra*. *Wilkins, supra*.

The Court confused the function of section 301(4), second sentence, that, "establishment of disability does not create a presumption of wage loss." The Court said in *Haske, supra*, 634-635, that,

> ". . . an employee must establish (1) a work-related injury, (2) subsequent loss in actual wages, and (3) a causal link between the two. Proof of the three elements will establish that an employee can no longer perform at least a single job within his qualifications and training, thus satisfying the first sentence of subsection 301(4), *and* that he has suffered a loss in wages, satisfying the second sentence of subsection 301(4)." (emphasis by the Court)

The reason that this was confused is that section 301(4), second sentence, serves to separate general disability from wage loss. Section 301(4), second sentence,

divorces general disability and wage loss by stating that general disability does not even imply a wage loss. Section 301(4), second sentence, preserves the other statutes in the WDCA which apply to determine the particular dollar amount of weekly compensation.

Finally, the Court did not properly grasp the relationship between general disability and retiree disability when stating,

> "[1] While the dissent suggests that the Legislature intended to reject this approach, there is no clear indication of legislative intent supporting this construction. Moreover, the amendment of the retiree presumption, MCL 418.373; MSA 17.237(373), clearly demonstrates that the Legislature knew how to accomplish the result advocated by the dissent and did not apply it to nonretirees. Thus, it strains logic to conclude that subsection 301(4)'s 'plain language,' *post* at 666, dictates the result advocated by the dissent." *Haske, supra*, 635, n 1.

The difference between general disability and retiree disability is not in the field of reference because both reference *work suitable to the employee's qualifications* with section 301(4), first sentence, stating, *work suitable to his or her qualifications and training* and section 373(1), second sentence, stating work suitable to the *employee's qualifications, including training or experience* but in the amplitude as section 301(4),first sentence, refers to *a limitation* while *section 373(1), second sentence, refers to unable to perform.* The mechanics of this difference in text are demonstrated by figure no. 4.

Finally, the attractiveness of the linear analysis invested by the Court in *Haske supra*, is a mirage. While obviously straightforward to the point of simplicity, the formulation collapses at least two points. One point of collapse is the case of the seasonal worker who experiences an injury in mid-season but continues with other duties at full pay until the end of the "season" which includes school teachers injured in October and reassigned from physical education classes to supervising a lunchroom until June; professional athletes injured before an "All Star" break and reassigned from player to media relations; the resort worker injured in June and reassigned from groundskeeping on the golf course to greeter at the door until October; as well as the migrant farm hand injured in

season and reassigned from picking to counting. All these people fail the formulation of *Haske, supra,* despite an inability to do a single job as a physical ed teacher, a baseball player, groundskeeper because there was no immediate loss of actual wages and the only reason for the actual loss of the wages is the later end of the school year, the end of playoffs, or the end of the golfing season and not the injury.

The other point of collapse occurs with the ebb and flow in the general economy. An employee who is able to resume another job which is suitable to his or her qualifications and training and does because there is an opening when the economy is at high tide is not generally disabled by the formulation of *Haske, supra.* Another employee with exactly the same qualifications and exactly the same injury but who does not resume work because there is no available opening when the economy is at low tide *is* generally disabled. The reason for the different treatment by the Court in *Haske, supra,* of two identically qualified and trained employees with an identical injury is the general economy which is extrinsic to both. An extrinsic circumstance is not important because section 301(4), first sentence, makes the focus on the intrinsic circumstance by using the singular possessive in the field of reference which is the *employee's* wage earning capacity.

This problem which the Court created in *Haske, supra,* has generated decisions by the Court of Appeals which have sought to use other statutes in the WDCA to describe general disability. The opinion of the Court of Appeals here is an example. The Court of Appeals used the description of *reasonable employment* in section 301(9) to establish that the Employee was generally disabled even though general disability must be established first as section 301(5) plainly states that, "[i]f disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this subsection [which later includes section 301(9)]" and *reasonable employment* is work beyond the field of reference of section 301(4), first sentence.

All six statutes in the WDCA which describe the five kinds of disability not only describe what each is but how to determine each. For example, a statute describes vocational disability and what is germane including age, education, training, and rejection of employment. Section 901(a). The statutes that describe scheduled disability and total and permanent disability not only define what each is such as the physical loss of a foot, section 361(2)(j), or feet, section 361(3)(b), but also exactly how to decide that may have occurred. Section 361(2)(j) states that physical measurement is how to decide the loss of a foot, "[a]n amputation between the knee and foot *7 inches or more below the tibial table* shall be considered a foot . . ." (emphasis supplied) Section 361(3)(b) directs a simple counting, "[l]oss of *both* . . . feet at or above the ankle . . ." (emphasis supplied) Likewise, the statute in the WDCA which describes retiree disability not only defines the term but describes how that may be decided. In particular, section 373(1), second sentence, requires establishing the individual employee's qualifications and training or experience and then assaying whether there is any suitable work which remains possible (figure no. 4). The actual pursuit of that work is not important.

Section 301(4), first sentence, does the same by describing general disability with the express text "'disability' means . . ." and how that may be established. Characterizing work as *reasonable employment* is not a part of that process. This is manifest by section 301(5), first sentence, which requires a general disability before the *reasonable employment* provisions of section 301(5)(a) - (e) and (8) - (9) can apply. Section 301(5) states, "*[i]f* disability is established pursuant to subsection (4) . . ." (emphasis supplied)

The Court has recognized this in *Perez v Keeler Brass Co*, 461 Mich 602; 608 *NW2d 45 (2000) where the Court held that there was no occasion to consider the reasonable employment* statutes and in particular, whether an earlier suspension ended when the injured employee purportedly accepted an earlier job offer because the injured employee was not disabled,

> " . . . it is undisputed that plaintiff voluntarily left his job in April 1987, thus refusing reasonable employment. Plaintiff did not take any action to end the period of refusal until November 1990. Thus, plaintiff was not entitled to benefits from April 1987 until November 1990. Had he still been disabled, plaintiff might have been entitled to reinstatement of benefits in November 1990. However, the magistrate found that plaintiff was no longer disabled as of February 1990, and plaintiff was not entitled to any benefits after that date. "

The determination of whether an injured employee is generally disabled cannot be "backed in" by characterizing subsequent work as *reasonable employment* with section 301(5).

RELIEF

Wherefore, amicus curiae Michigan Self-Insurers' Association prays that the Supreme Court reverse the opinion of the Court of Appeals.

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